IN THE

Supreme Court of the United States

October Term, 1976

No. 76-344

COUNCIL OF SUPERVISORS & ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, SASOC, AFL-CIO,

Petitioner,

—against—

BOSTON CHANCE, LOUIS MERCADO, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

This brief is submitted in reply to the briefs in opposition filed by respondents Boston Chance, et al. (hereafter the plaintiffs) and respondent Board of Education.

1. Respondent's Attempts To Salvage The First Chance (458 F.2d 1167) Decision From The Overruling Effect Of *Washington* v. *Davis*, 96 S. Ct. 2040 Are Unavailing.

Despite respondents attempts to resuscitate the decision in Chance I (458 F.2d 1167), that case was specifically disapproved and overruled by *Washington* v. *Davis*, *supra*, 96 S.Ct. at 2050 n.12. The arguments made to demonstrate that this Court erred in including *Chance I* in the list of cases *Davis* overruled are specious.

The court of appeals in Chance I held that the "heavy burden of justifying its contested examination" shifted to the defendant Board of Examiners in the conceded absence of any proof by plaintiffs of "intentionally discriminatory legislation . . . or even a neutral scheme applied in a discriminatory manner . . ."; but only because ". . . the district court found that the Board's examinations have a significance and substantial discriminatory impact" on minority applicants. (458 F.2d at 1175).

Under *Davis*, the prerequisite to shifting the burden of proof to the defendant to justify an official practice is proof by plaintiffs of a *prima facie* case of racial discrimination. This is established either by proving that the official practice is intentionally discriminatory or by proving that it is a neutral scheme applied in a discriminatory manner (96 S.Ct. at 2048). A *prima facie* case sufficient to shift the burden to the defendant is not made out simply by showing that the practice in question "may affect a greater proportion of one race than another." 96 S.Ct. at 2049.

The reason for requiring proof of discriminatory racial purpose in an equal protection case is self-evident: How can "a law establishing a racially neutral qualification for employment [be] nevertheless racially discriminatory and [deny] 'any person equal protection of the laws' simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups." *Washington* v. *Davis, supra,* 96 S.Ct. at 2050. More than a showing of disproportionate racial impact is necessary because the fact that more Negroes than whites have been disqualified from employment by a given test does "not demonstrate that respondents individually were being denied equal protection of the laws by the application of an otherwise valid qualifying test being administered to prospective . . . recruits." 95 S.Ct. at 2051.

And in this context an "otherwise valid qualifying test" does not mean one which the defendants prove is job related, as the court of appeals in Chance I required (458 F.2d at 1176), but only a test which is "a racially neutral qualification for employment" 96 S.Ct. at 2050.

In Chance I, the plaintiffs established only that a racially neutral qualification for employments—one concededly not intentionally discriminatory or applied in a discriminatory manner—had the unintended result of adversely affecting a greater proportion of one race than another. By being unable to prove anything more than this, they failed to establish a *prima facie* case of invidious discrimination under the equal protection clause as interpreted in *Washington v. Davis, supra.*

Respondents ignore entirely the holdings in Chance I on proof of a *prima facie* case, and the diametrically opposite holding in *Davis* on the same issue. They focus instead only on the proper test to be applied once a *prima facie* case is established and the burden of proof has shifted. (See especially Plaintiffs Br. 8) By tailoring their arguments in this respect, they demonstrate that they have engaged in obfuscation, not elucidation, of the real issues involved in this case.

2. The Board Of Examiners Appeal To The Second Circuit Has No Impact Whatsoever On The Issues Presented In This Petition.

Plaintiffs argue that this petition must be denied "because a pending appeal by the party to this case which is charged with primary representation on these issues, the Board of Examiners, is now raising the same issue before the court of appeals." (Br. 9)

What they fail to disclose to the Court is that a decision below favorable to the Examiners on the *Davis*

issue will have absolutely no effect upon the award of constructive seniority already made to members of their class if certiorari is denied in this case.

The award of constructive seniority at issue here was made by the court of appeals on May 17, 1976, two months before the Examiners took their appeal from a totally separate order of the district court modifying a prior consent judgment regulating the content and administration of future examinations for supervisory positions in New York City. The Examiners appeal will not be argued until January, 1977.

In this brief to the circuit, the Examiner make it clear that they only:

> ". . . seek to vacate the concert judgment insofar as it now has *prospective* application. They do not wish to disturb licenses issued or other rights, privileges or perquisites obtained, under that Judgment." (emphasis in the original) (Br. 27, f.n.)*

The award of constructive seniority by the court below has already been made and it will become final and irrevocable if certiorari is denied in this case.

If certiorari is denied here, and the Examiners prevail in the court below on the *Washington* v. *Davis* argument, then plaintiffs will have succeeded in obtaining constructive seniority for member of their class despite for a subsequent dismissal of their entire cause of action, simply because certiorari denied and seniority rights vested in this case before the Examiners appeal was decided. This

* The plaintiffs have lodged their brief and the Examiners' Court of Appeals brief in this Court (Plaintiffs Br. 9 n.8). For completeness, the CSA amicus brief filed in that case is also being lodged with the Clerk of the Court.

result would be absurd and should not be permitted to occur.

If the Court wishes to insure that this case and the Examiner appeal run parallel courses, it can decide this case now to give the circuit court proper guidance in the Examiner's case; or remand this case to the circuit with directions to consider the *Washington* v. *Davis* question here presented in conjunction with the Examiner's appeal; or defer action upon this petition until the circuit has rendered its decision*; or even grant certiorari in this case, allowing the Examiners to petition for review immediately without awaiting the court of appeals decision. See *Porter* v. *Dicken*, 328 U.S. 252, 254 (1959). Any of these alternatives would prevent the otherwise real possibility that seniority rights could well vest under a judgment subsequently vacated simply because the timing in this case and the Examiners appeal below were out of phase.

3. Plaintiffs Arguments On The Effect Of Petitioner's Status As Intervenor In This Case Are Irrelevant To The Issues Before This Court.

The plaintiffs cite many cases for the truism that intervention will not be allowed for the purpose of impeaching a decree already made. (Br. 7). They cite no cases —nor are there any—which hold that once intervention is granted and while the intervenors' appeal is pending, an intervenor is precluded from urging the appellate court to apply the law in effect at the time of its decision, even

* This course of action would mean that the legislation begun in 1970 would continue into its eighth year—a result already strongly cautioned against by Judge Feinberg in the second *Chance* case 496 F.2d 820, 825.

if the law was different at the time of the lower court's decision. *Cf. United States* v. *Schooner Peggy*, 5 U.S. 10, 110 (1801); *McComb* v. *Crane*, 174 F.2d 646 (5th Cir. 1949).

In this petition, we ask only that the Court assess the correctness of the court of appeals grant of constructive seniority below in light of the intervening change in the law brought about by *Washington* v. *Davis, supra.* We have not asked the Court to vacate the decrees entered in this case prior to our intervention,* but only to hold that under *Davis*, no member of plaintiffs' class is entitled to constructive seniority to remedy past discrimination in hiring, because none were victims of the invidious discrimination prohibited by the equal protection clause.

Even if the CSA is deemed bound by the 1970 injunction decree and the 1972 consent decree despite the fact that it was not permitted to intervene below until 1974, this does not change the result. Even where the parties to a prior judgment are the same, the doctrines of collateral estoppel and res adjudicata cannot be successfully invoked where the legal rule applicable to the same facts has been changed between two proceedings. *Systems Federation* v. *Wright*, 364 U.S. 642 (1961); *Theriault* v. *Smith*, 523 F.2d 601 (1st Cir. 1975); *Bush* v. *Commissioner*, 175 F.2d 391 (2d Cir. 1949) (cited and discussed at pp. 3-6, CSA Amicus Brief in the court below)

The reason for refusing to estop even a party from relying on a subsequent change in the law is most appropriate in this case:

> "If collateral estoppel were applied in this situation, a judgment would petrify the law as to the [party] who won or lost, so that a subsequent change of law would not affect him, and his treatment under the supplanted legal principle would be unfairly advantageous or disadvantageous." 1B Moore's Federal Practice, § 0.448, p. 4237.

* This is the relief requested by the Board of Examiners in its appeal presently pending in the court below.

By asking this Court to disregard the overruling effect of *Washington* v. *Davis, supra*, upon the decision below and to deny certiorari, the plaintiffs are actually asking that they be given unfairly advantageous treatment under a supplanted legal principle.*

4. Respondent's Remaining Arguments Are Question-begging

Plaintiffs reliance on *Franks* v. *Bowman*, 47 L.Ed.2d 444 (1976) to answer our Point II is misplaced. *Franks* is the beginning, not the end, of the inquiry we urge this Court to undertake in this case if summary judgment is denied. The question here is not whether *Franks* authorizes a constructive seniority award, but whether it is authority for doing so in a case where the seniority system involved is mandated by state statute, in this case N.Y. Ed. Law § 2585;* whether is is au-

* Plaintiffs also attempt to justify the award on the ground that the judgments below merely impose the same requirements as Title VII, as amended in 1972, hence the relief already gotten could be obtained in any event via an amended complaint. (Br. 9). They conveniently overlook the fact that the 1972 amendments to Title VII have not been applied retroactively to conduct occuring before the effective date of the amendment where the employer is not the federal government, in the very circuit in which they would have to seek such relief. *Monell* v. *Department of Social Services*, 532 F.2d 259 (2d Cir. 1976).

* Plaintiffs confusion about which state statute is involved in this litigation (Br. 10 n.9) was not shared by the Court of Appeals below. (Opinion of the Court of Appeals, Petitioners Appendix, 3a n.1)

thority for doing so in a case involving pedagogical personnel, not factory workers; and whether it is authority for doing so when the highest court of the state involved has refused to remedy past employment discrimination by ordering a public employer to violate other valid provisions of state civil service law. We argued that certiorari was proper here as these questions have not yet been decided by the Court. The plaintiffs' failure to cite a single case to the contrary fully substantiates our claim that these questions are novel ones warranting a grant of certiorari in this case.*

CONCLUSION

For these reasons, and those previously stated, the judgment and opinion of the Second Circuit should be summarily reversed; alternatively, a writ of certiorari to review that judgment and opinion should be granted.

Dated: New York, New York
Nov. 10, 1976

Respectfully submitted,

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* The Board of Education implies that the constructive seniority issue is dead because they have already begun to implement the lower court decision. No excessing occurred this year because the CSA membership gave up wage increases in order to retain jobs for persons who would have been excessed. (Amsterdam New Editorial, addendum A, petitioner's amicus brief). No further excessing will occur until September, 1977.